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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U.S.
FILED
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Nos. 73-434, 73-435, 73-436

WILLIAM G. MILLIKEN, ET AL.,
Petitioners,

v.

RONALD BRADLEY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION

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MOTION OF THE NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Education Association (NEA) hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief amicus curiae on the merits in the above entitled cause. Petitioners and respondents Detroit Board of Education, et al., have withheld their consent to the filing of this brief. Respondents Bradley, et al., have not, to date, responded to the request for consent. Accordingly, NEA seeks leave of the Court to file its brief.

The National Education Association is an independent, voluntary organization of educators open to any person

who is actively engaged in the profession of teaching or other educational work, or any other person interested in advancing the cause of education. It presently has more than one million, three hundred thousand regular members, and is the largest professional organization in the nation. NEA was first organized in 1857 and was chartered by a special act of Congress in 1906. Its statutory purpose is

> "to elevate the character and advance the interests of the profession of teaching, and to promote the cause of education in the United States." (34 Stat. 805.)

The overall policies of NEA are determined by its Representative Assembly, a body composed of approximately 7,000 delegates representing affiliated local and state education associations.

A major interest of NEA is to secure equality of education and sound education for children of all races. It is convinced that segregated education is not only inherently unequal but adversely affects the quality of education afforded to all students, not least by denying them adequate preparation for living and working in a society in which they must deal with persons not of their own race. Reflecting this concern, NEA's Representative Assembly at its 1973 Convention adopted a specific resolution on desegregation in the public schools, which provided in part:

> "The National Education Association believes it is imperative that desegregation of the nation's schools be effected. Policies and guidelines for school desegregation in all parts of the nation must be strengthened and must comply with *Brown* v. *Board of Education; Alexander* v. *Holmes County Board of Education, Mississippi;* other judicial decisions; and with civil rights legislation.

> "The Association recognizes that acceptable desegregation plans will include a variety of devices such as geographical realignment, pairing of schools, grade pairing, and satellite schools. These arrangements may require that some students be bussed in order to implement desegregation plans which comply with established guidelines adhering to the letter and the spirit of the law. The Association urges that all laws of this nation apply equally to all persons without regard to race or geographic location." (NEA, *1973 Handbook*, p. 51.)

NEA desires to participate in the case at bar not only because of its interest in equal educational opportunity and sound educational practices, but also because it believes it can be of service in informing the Court as to the general character and dynamics of racial segregation in the public schools of a multi-district metropolitan area such as that in issue here.[1]

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[1] The NEA and its state affiliates have participated as amicus curiae in other major proceedings involving issues of school desegregation. See *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189 (1973); *School Board of the City of Richmond, Virginia* v. *State Board*, 412 U.S. 92 (1973); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); and *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969).

Wherefore, the National Education Association requests that this Court grant leave to file the accompanying brief amicus curiae.

Respectfully submitted,

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BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION

ARGUMENT

I

INTRODUCTION AND SUMMARY

Twenty years ago this Court held that "separate but equal" public education for the black and white races was not only a contradiction in terms but also a contravention of the Fourteenth Amendment. *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Since that time, with impetus from this Court's decisions in *Green*, *Alex-*

ander and *Swann*,[1] substantial school integration has taken place almost everywhere throughout the South.[2]

Last term this Court decided its first "northern" school desegregation case. *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189 (1973). Among the important aspects of *Keyes* is its holding that a segregatory statute—the hallmark of the southern dual system—is not the *sine qua non* of de jure school segregation. The Court recognized that a dual system of schools can be fostered and maintained by official policies and practices as well as by statutory fiat. As the Court said, "where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities in the school system, it is only common sense to conclude that there exists a predicate for finding the existence of a dual school system." *Id.*, at 201.

Keyes is also important because it lays bare certain fundamental elements of de jure school segregation, northern style. Northern school segregation is produced by maintaining in the face of residential segregation an assignment policy commonly called the "neighborhood school plan." And, as *Keyes* recognizes, the segregatory effec-

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[1] *Green* v. *County School Board*, 391 U.S. 430 (1968); *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

[2] In 1954, almost every black child of school age was assigned to all-black schools in the States of Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia. In 1972, 47.1 percent of the black children attended all-black schools. In the most "dismantled" southern State—Virginia—only 362 black children (0.2 percent) in surveyed districts attended all-black schools. HEW Office for Civil Rights, *Analysis of Fall 1972 Survey Districts, Which Reported by November 20, 1972, Compared with Their Fall 1970 Data* (1973), at 7, 9 (1972 data is unedited).

tiveness of the neighborhood school plan is maximized by further official action in drawing attendance zones, establishing feeder patterns, designating optional zones, replacing or refurbishing school facilities, and other policies and practices adopted with a view to confining black children to black schools. In particular, as the black residential area expands into previously white areas, officials utilize these devices to preserve segregation.

If the Detroit metropolitan area were served by a single school district, this case would be indistinguishable from *Keyes*. For the record in this case reveals essentially the same official segregatory acts which in *Keyes* made out a prima facie case of de jure segregation.[3] Here, as the district court found, there is clear-cut residential segregation throughout the metropolitan area, with the great majority of blacks contained in an expanding core in the City of Detroit (23a-24a).[4] Here, as in *Keyes*,[5] school officials have manipulated the neighborhood assignment system at the edges of the expanding black core with the result that the segregatory effects of the neighborhood school system have been maximized (24a-27a).

But even though the dynamics and segregatory effects are the same in Detroit as they were in Denver, the case at bar differs in one respect. Here, the metropolitan area is fragmented into a multitude of school districts. One district tracks the city boundaries of Detroit. The others

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[3] On remand in *Keyes* the district court held that the Denver school system was a dual school system. *Keyes* v. *School District No. 1, Denver*, No. C-1499 (D. Colo., Dec. 11, 1973).

[4] The parenthetical page references followed by the letter "a" refer to the page number of the separate Appendix filed with the Petitions for Writs of Certiorari. The parenthetical page references with the Roman numeral and "a" prefix, *e.g.*, (IIa 25), refer to the page numbers of the principal five-volume Appendix filed in this Court.

[5] See *Keyes* v. *School District No. 1, Denver*, 303 F. Supp. 289, 290-91 (D. Colo. 1969).

are crazy-quilted around the city.[6] The issue presented concerns the power and obligation of the court to go beyond the boundaries of the city system in framing equitable relief.

The central consideration in the resolution of this issue is the fact that the school district lines in the Detroit metropolitan area, to a substantial extent, form racial partitions separating predominantly black from overwhelmingly white schools. The Detroit School District contains 90 percent of the black students in the 54-district metropolitan area covered by the district court's order, and its student population is 67.6 percent black. Of the 53 other school districts in the area, two are more than 90 percent black. The remaining 51 districts, as a whole, are 96.9 percent white.[7] Thus, in large measure, blacks in the Detroit metropolitan area are separated from whites by school district lines.

The district court found and the court of appeals, sitting en banc, affirmed that the Detroit school officials and the state authorities have pursued racially segregatory school policies in the Detroit School District, that the city schools are de jure segregated and that the effects of this de jure segregation cannot be undone without resort to an interdistrict remedy.

As amicus, NEA suggests that this Court should remand the case to the district court for further inquiry

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[6] For purposes of our discussion in this brief, we shall consider the 54 school districts included in the desegregation area designated by the district court's order (101a) as the relevant metropolitan area.

[7] These figures were extrapolated from statistics compiled by the Department of Health, Education and Welfare for the year 1972. See HEW, *Student and Classroom Teacher Data by Ethnicity for School Districts Surveyed in 1972 and Also Contained in the Nation's 25 Largest SMSAS (Standard Metropolitan Statistical Areas) —Minority Student-Wise* (1973), at 33-38 (hereinafter, *HEW 1972 Survey*). See also p. 21, *infra*.

into the extent of the interdistrict segregation in the metropolitan area; the scope and nature of official policies and actions of a discriminatory nature contributing to such segregation, including the interdistrict impact of containment measures implemented in the Detroit School District; and the appropriate remedy.

We show below that public officials may pursue various policies and actions for the purpose or with the effect of fostering and maintaining interdistrict school segregation in a metropolitan area whereby school district lines separate identifiably black school districts from identifiably white districts. By its very nature, interdistrict segregation cannot be undone within the boundaries of the individual districts. Consequently, where official policies and actions of a discriminatory nature have contributed substantially to such segregation, the court has the power and the duty to fashion an interdistrict remedy.

We show further that the record in this case is sufficient to suggest that interdistrict segregation exists in the Detroit metropolitan area and that discriminatory activities of public officials may have substantially contributed to such segregation. The contribution of official activities to the interdistrict segregation, however, was not fully explored in the trial court because the "violation" phase of this case was tried at a time when plaintiffs sought no more than a Detroit-only remedy (13a-15a). Moreover, during the "violation" phase of the case, the outlying school districts were not parties and lacked the opportunity to show that the segregation in their districts was not the product of official action. Accordingly, we suggest that the Court vacate the judgment below and remand the case to the trial court for supplementation of the record and thereafter for findings with respect to the extent of interdistrict school segre-

gation and any official contribution thereto, and for the framing of an appropriate remedy.

II

OFFICIAL ACTION CAUSING OR SUBSTANTIALLY CONTRIBUTING TO SCHOOL SEGREGATION ON AN INTERDISTRICT BASIS SUPPORTS AN INTERDISTRICT REMEDY

A. The Dynamics of Interdistrict School Segregation.

School segregation is pervasive in northern metropolitan areas.[8] Some of the dynamics of this segregation can be identified from a growing body of decided cases in which facts have been spread upon the record.

First, there is widespread residential segregation in northern metropolitan areas. Most blacks live in an almost exclusively black urban core or in other black pockets, rather than fanning out through the metropolitan region. Thus, the center city cores of the nation's major metropolitan areas are heavily black and becoming more so and are surrounded by overwhelmingly white areas.[9] This residential segregation is caused, in large

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[8] See U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* (1967), at 2-10, 40-59 (hereinafter, *Racial Isolation*); *HEW 1972 Survey, supra, passim.*

[9] Statistics compiled by the U.S. Census Bureau reveal that in the eleven largest metropolitan areas outside the South (New York, Los Angeles, Chicago, Philadelphia, Detroit, San Francisco-Oakland, Boston, Pittsburgh, Baltimore, Cleveland and Newark), the average percentage of blacks in the central cities in 1970 was 32.6—an increase of 36.8 percent from 1960. During the same period, the white population of these cities decreased by an average of 18.3 percent. The percentage of blacks in these metropolitan areas outside the central cities remained extremely small—an average of 5 percent in 1970 (as compared with 4 percent in 1960). U.S. Department of Commerce, Bureau of the Census, *General Demographic Trends for Metropolitan Areas, 1960 to 1970* (1971), at 1-34; U.S. Department of Commerce, Bureau of the Census, *Negro Population in Selected*

measure, by a combination of private acts of housing discrimination and official segregatory actions, including restrictions on black or low-income residency, large-lot and single-family zoning, discriminatory denials of zoning changes, exclusive placement of public housing in black neighborhoods, discriminatory assignment of public-housing tenants, and racially motivated vetoes of low-income housing projects in white areas. See, *e.g.*, *Gautreaux* v. *Romney*, 448 F.2d 731 (7th Cir. 1971); *Kennedy Park Homes Assoc.* v. *City of Lackawanna*, 436 F.2d 108 (2d Cir.), *cert. denied*, 401 U.S. 1010 (1971); *Mahaley* v. *Cuyahoga Metropolitan Housing Authority*, 355 F. Supp. 1257 (N.D. Ohio 1973); *Banks* v. *Perk*, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part and rev'd in part*, 473 F.2d 910 (6th Cir. 1973).[10]

Second, school boards, in building new schools, refurbishing old schools, and assigning children to schools, employ a "neighborhood school" concept. Thus, the boards build into their school systems the residential segregation of their communities. See, *e.g.*, *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501, 522 (C.D. Cal. 1970); *United States* v. *School District No. 151 of Cook County*, 301 F. Supp. 201, 230 (N.D. Ill. 1969), *aff'd*, 432 F.2d 1147 (7th Cir. 1970). Cf. *United States* v. *Board of School Commissioners, Indianapolis, Indiana*, 474 F.2d 81, 86 (7th Cir. 1973); *Cisneros* v. *Corpus Christi Independent School District*, 467 F.2d 142, 149 (5th Cir. 1972) (en banc).

Places and Selected Counties (1971), at 5. See also *Racial Isolation*, at 11-12, 18-20, 31-33.

[10] See also the trial court's finding in *Swann* that Charlotte's black residential areas are the results of "so much state action . . . that the resulting segregation is not innocent or *'de facto'*. . . ." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 306 F. Supp. 1299, 1304 (W.D.N.C. 1969).

Third, as blacks increase in number and begin to move into formerly white residential areas which have been served by white schools, school boards take steps to contain blacks and to maximize opportunities for whites to attend white schools. Among the techniques employed have been adjustment of attendance boundaries, alteration of feeder patterns, creation of optional zones, liberalization of transfer policies, busing of white students out of fringe areas, use of portable classrooms, and tailoring the location, capacity and grade structure of new schools so as to maintain racial homogeneity. See, *e.g.*, *Kelly* v. *Guinn*, 456 F.2d 100 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); *Davis* v. *School District of City of Pontiac*, 443 F.2d 573 (6th Cir. 1971); *United States* v. *School District No. 151 of Cook County*, *supra*; *Johnson* v. *San Francisco Unified School District*, 339 F. Supp. 1315 (N.D. Cal. 1971); *Spangler* v. *Pasadena City Board of Education*, *supra*. See also 24a-26a; 118a-151a; IIa 171-312. Cf. *United States* v. *Board of School Commissioners of Indianapolis, Indiana*, *supra*.

Where an entire metropolitan area comprises but one school district, the determination whether official action has caused or substantially contributed to the segregation of the public schools in that district is relatively straightforward. The principal inquiry involves the segregatory acts and intent of the school board. See *Keyes* v. *School District No. 1, Denver*, *supra*, at 208. But where, as in the present case, a metropolitan area is fragmented into many school districts, the determination whether official action has caused or substantially contributed to the segregation of the schools in that area obviously is made more difficult by the proliferation of school authorities.

Yet, in such a metropolitan area, the schools may, in fact, be segregated on an interdistrict basis. Black students and schools may be divided from white students

and schools, in large measure, by school district boundaries. In short, the school district lines may form partitions between or among racially identifiable districts.[11]

Official actions and policies may contribute substantially to the segregation of schools along school district lines. These may include policies and practices of both state and local officials.

1. The decided cases leave no doubt that interdistrict segregation can be and has been produced by official manipulation of school district lines to maximize school segregation among districts. See *Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972); *United States* v. *Scotland Neck Board of Education*, 407 U.S. 484 (1972); *Lee* v. *Macon County Board of Education*, 448 F.2d 746 (5th Cir. 1971); *Haney* v. *County Board of Education*, 429 F.2d 364 (8th Cir. 1970); *United States* v. *State of Missouri*, 363 F. Supp. 739 (E.D. Mo. 1973); *United States* v. *State of Texas*, 330 F. Supp. 235 (E.D. Tex.), *aff'd in pertinent part*, 447 F.2d 441 (5th Cir. 1971); *Hoots* v. *Pennsylvania*, 359 F. Supp. 807, 820-21 (W.D. Pa. 1973). Freezing school district lines can also be an effective means of maintaining interdistrict school segregation. For example, in *United States* v.

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[11] Such interdistrict segregation is present in other metropolitan areas outside the South in addition to the Detroit metropolitan area (see p. 21, *infra.*). The 1972 HEW survey reveals the following examples: in the Chicago metropolitan area, the city school district was 57.1% black, while the outlying districts were 5.9% black; in the Philadelphia metropolitan area, the city district was 61.4% black, the outlying districts 8% black; in the Baltimore metropolitan area, the city district was 69.3% black, the outlying districts 7.6% black; in the Cleveland metropolitan area, the city district was 57.6% black, the outlying districts 5.7% black; in the Newark area, the city district was 72.3% black, the outlying districts 14.3% black; in the Gary area, the city district was 69.6% black, the outlying districts 5.5% black; and in the San Francisco-Oakland metropolitan area, the Oakland city school district was 60% black, the others 11% black. *HEW 1972 Survey*, at 13-32, 43-47, 61-69, 97-98.

Board of School Commissioners, Indianapolis, Indiana, 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir. 1973), school district lines had always been coterminous with the city limits until 1969. In that year, the city limits were extended to include the surrounding county (which was completely urban), but the school district lines were frozen so that they divided overwhelmingly white county districts from a city district that contained the bulk of the blacks in the county. *Id.* at 674-76.[12]

2. Likewise, the decided cases leave no doubt that interdistrict school segregation can be and has been produced by arrangements among neighboring school districts. Classic examples occurred where it was not feasible for several adjoining southern school districts each to build a black school for its small number of black children. In response, two or more school districts pooled their black children and educated them at a consolidated black school. See *Newburg Area Council Inc.* v. *Board of Education of Jefferson County*, No. 73-1403 (6th Cir., Dec. 28, 1973); *United States* v. *State of Missouri*, *supra*; *United States* v. *State of Texas*, *supra*. This technique is not indigenous to the South. As we point out *infra*, p. 24, a similar practice was employed in the Detroit metropolitan area whereby black students from an all-black district with inadequate facilities of its own were assigned to a predominantly black school in another district instead of to white schools in closer proximity.

3. Official responsibility for interdistrict school segregation is not limited to the manipulation or freezing of district lines or arrangements among neighboring school

[12] Many States have, since at least 1930, adopted policies of encouraging, if not requiring, school consolidation. NEA Research Division, *Estimates of School Statistics, 1969-70*, at 5-6 (1969). There is some evidence, however, that these policies have foundered when the school district lines separated territories having markedly different racial ratios. See *Hoots* v. *Pennsylvania*, 359 F. Supp. 807, 819 (W.D. Pa. 1973).

districts. Other actions of state and local officials, in combination or through interaction, may contribute substantially to interdistrict segregation in more subtle, but no less effective, ways.

(a) In the core areas or other black areas, state and local school authorities may employ a variety of the containment techniques described above (*supra*, p. 12). Such practices may have interdistrict impact. Predominantly black schools in such areas discourage whites from moving into the territory served by such schools and encourage whites living there to move to white suburbs. Conversely, those schools act as magnets, holding blacks already there and drawing to them blacks entering the metropolitan area. The racially impacted nature of such schools also may lead public housing officials and private realtors and brokers to steer blacks to the areas surrounding those schools and away from the white suburbs. Thus, the acts of school officials aimed at confining blacks within their boundaries may affect both the overall racial character of their own districts as well as the racial character of districts beyond their borders. See *Green* v. *County School Board*, 391 U.S. 430 (1968); *Swann* v. *Charlotte-Mecklenburg Board of Educ.*, *supra*, at 20-21.

(b) At the same time as school officials in districts with heavy concentrations of blacks are taking containment action, officials in virtually all white suburban districts may be engaging in discriminatory activities. Whatever the action in the predominantly black areas, the white suburban districts will remain white so long as private and public housing discrimination is effective in those suburbs. Where local suburban housing and zoning authorities, with the sanction of the State, take action in the predominantly white suburbs, through the techniques described above, *supra*, pp. 10-11, with the purpose or effect of excluding blacks from their jurisdictions, such official actions contribute to the maintenance

of racially identifiable districts. Likewise, restriction of public employment opportunities for blacks in these white suburban areas may further discourage them from residing outside the core area.

(c) Local suburban school officials in such predominantly white suburbs may contribute further to the interdistrict segregation by adopting policies and practices which discourage in-migration of blacks. For example, such officials may reinforce the white racial identity of their schools by discriminating against black applicants for faculty positions and hiring only whites.[13]

(d) Finally, state policies may also contribute to interdistrict segregation. For instance, where state policies enable suburban districts with overwhelmingly white student enrollment to provide more and better services than neighboring city districts with heavily black student enrollments, such policies attract to the suburban districts those with greater economic mobility, mostly whites.[14]

In sum, where official actions cause blacks to be contained in certain identifiably black school districts in a metropolitan area and discourage whites from living

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[13] As long as city school and housing officials are containing blacks in the core, and as long as housing discrimination assures that there will be only white residents in the suburban school districts, suburban school officials have no occasion to engage in discriminatory student assignment policies. Indeed, when there are no black children in a suburban school district, the only meaningful segregative action open to the suburban school boards may be to avoid recruiting black applicants for teaching and administrative positions and to discriminate against any blacks who happen to apply, thereby ensuring the existence of a school climate inhospitable to blacks.

[14] In *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973), the Court considered a state school financing formula which plaintiffs alleged discriminated against them on the basis of wealth. The Court did not consider the question whether a state financing system which has the effect of discriminating or contributing to discrimination against blacks is unconstitutional. Compare *id.* at 28.

there, and at the same time other official actions prevent or discourage blacks from moving to the predominantly white suburban school districts and encourage whites to remain or move there, then the effect of such official actions may be to contribute substantially to the creation or preservation of racially identifiable districts in the area—interdistrict school segregation.

B. Where Public Officials Have Caused or Substantially Contributed To Interdistrict School Segregation, the Court Has the Remedial Power To Eliminate Such Segregation Irrespective of School District Lines.

When all or many of these official actions are present in a metropolitan area in which the schools are in fact segregated on an interdistrict basis—*i.e.*, where school district boundaries divide predominantly white districts from predominantly black ones—then it must be determined whether those actions have caused or contributed substantially to the interdistrict segregation. If they have, then such officials have engaged in a violation of the Fourteenth Amendment, the very nature of which involves more than one school district. Since the effect of the unconstitutional action crosses district lines, obviously the remedy, to be effective, must do so as well.[15] For "the nature of the violation determines the scope of the remedy." *Swann* v. *Charlotte-Mecklenburg Board of Educ.*, *supra*, at 16. "Once a right and a violation have been shown, the scope of a district court's equitable power to remedy past wrongs is broad, for breadth and flexibility inhere in equitable remedies." *Id.* at 15.

It is clear that school district lines per se do not stand as an absolute barrier to remedying officially imposed

[15] "The Government of the United States has been emphatically a government of laws and not of men. It will certainly cease to deserve this high appelation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

interdistrict segregation. In *Brown* v. *Board of Education*, 349 U.S. 294, 300-01 (1955), the Court said that in dismantling the dual system "the courts may consider problems . . . arising from . . . revision of school districts and attendance areas into compact units . . . ." And in *Swann*, the Court recognized that "one of the principal tools employed by school planners and by courts to break up the dual system has been a frank—and sometimes drastic—gerry-mandering of school districts and attendance zones." 402 U.S. at 27. Indeed, the Court has held that where a new school district was created out of a large district, so that the district line divided a majority-black district from a majority-white one, thus impeding the desegregation process, an interdistrict remedy was proper. *United States* v. *Scotland Neck Board of Education*, *supra*. See also *Wright* v. *City of Emporia*, *supra*; *Lee* v. *Macon County Board of Education*, *supra*; *Haney* v. *County Board of Education*, *supra*.[16] Similarly, where officials have purposefully frozen school district lines so that they preserve racially identifiable districts, or where they have disregarded district lines so as to maintain segregation, the courts have ordered interdistrict relief. *United States* v. *Board of School Commissioners, Indianapolis, Indiana*, *supra*; *Newburg Council* v. *Board of Education of Jefferson County*, *supra*.

The fact that school district boundaries do not, in and of themselves present an insuperable obstacle to interdistrict relief does not resolve the question of remedy in

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[16] See also *Cooper* v. *Aaron*, 358 U.S. 1, 16, 17 (1958): "[F]rom the point of view of the Fourteenth Amendment, [local officials] stand in this litigation as agents of the State. . . . [and] the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, . . . or whatever the guise in which it is taken. . . ." Thus, where official action has contributed to interdistrict segregation within one State, the existence of school district lines does not preclude interdistrict relief.

any given case. When official actions of a discriminatory nature have contributed to interdistrict segregation that is not remediable within the boundaries of the individual districts, the trial court must still determine the appropriate scope of the interdistrict relief necessary to redress the constitutional violation found. In that determination, the extent of the official contribution to the interdistrict segregation is pertinent to shaping the scope of the remedy. Finally, in fashioning such interdistrict relief as may be necessary to cure the violation, the court must take "into account the practicalities of the situation," *Davis* v. *Board of School Commissioners*, 402 U.S. 33, 37 (1971), including the availability of school facilities, their proximity to the student population, the feasibility of rerouting transportation, and the time and distance required for students to be transported from home to school. See *Swann* v. *Charlotte-Mecklenburg Board of Educ.*, *supra*, at 30-31.

III

A REMAND IS APPROPRIATE FOR A DETERMINATION WHETHER OFFICIAL DISCRIMINATORY ACTION HAS CONTRIBUTED SUBSTANTIALLY TO INTERDISTRICT SCHOOL SEGREGATION IN THE DETRIOT METROPOLITAN AREA

In the instant case, respondents urge that the de jure school segregation in Detroit cannot be remedied effectively without crossing district lines and that for that reason an interdistrict remedy is proper. These contentions and those of the petitioners present constitutional issues of immense consequence to the future of race relations. We submit that the Court should not reach these questions on the limited record before it.

Because this case was tried on a Detroit-only theory, the evidence in the record is embryonic on the existence

of interdistrict segregation and the contribution thereto of official discriminatory actions. Yet on the basis of this record the district court held that interdistrict relief was required. In view of the importance of the constitutional rights and remedies involved, we believe that the propriety of such relief would be better determined after an adequate record is developed on the existence of interdistrict violations. Accordingly, we suggest in this section of our brief that the Court vacate the order of the court of appeals and remand this case to the district court for an inquiry into the extent of interdistrict segregation in the metropolitan area; the scope and nature of official actions contributing to such segregation, including the interdistrict impact of the containment measures implemented in the Detroit School District; and the appropriate remedy.

As we show below, the present record suggests that interdistrict school segregation does exist in the Detroit metropolitan area and that official policies and actions of a discriminatory nature may have substantially contributed to such segregation. If these indications are confirmed in the remand proceedings, the propriety of interdistrict relief will be clear, thereby eliminating the difficult constitutional issues now before the Court. On the other hand, if the district court should find the interdistrict segregation is not de jure, the fuller and more pointed record would assist that court, as well as this one, in determining the resulting constitutional issues.

A. The Record in this Case Suggests That the Schools in the Detroit Metropolitan Area Are Segregated on an Interdistrict Basis and that Official Action of a Discriminatory Nature May Have Contributed Substantially to Such Segregation.

Although the trial on the issue of de jure segregation was limited to the Detroit School District, there is no

question that interdistrict school segregation is present in the metropolitan area. The trial court found that "the metropolitan area is like a giant jig-saw puzzle, with the school districts cut into irregular pieces, but with the picture quite plainly that of racial segregation" (40a). As of 1972, there were 547,966 white school children and 207,524 black school children in the 54 districts included within the district court's remedial order. Ninety-five percent of these black children were isolated in three school districts—Highland Park, 90.9 percent black; Inkster, 90.1 percent black; and Detroit, 67.6 percent black. The other 51 school districts, as a whole, were 96.9 percent white. Forty-four of these districts were 95 percent or more white. Four others diverged sharply from the racial make-up of the student population of the entire metropolitan area (71.7 percent white, 26.9 percent black): Ferndale (91 percent white); Oak Park (87 percent white); Romulus (83.2 percent white); and Ecorse (51.3 percent black).[17]

The record further suggests that this interdistrict school segregation may be in substantial part the product of official action. The district court found that the residential segregation which pervades the Detroit metropolitan area and underpins the interdistrict school segregation is, in part, the result of government action:

> "The City of Detroit is a community generally divided by racial lines. Residential segregation within the city and throughout the larger metropolitan area is substantial, pervasive and of long standing. Black citizens are located in separate and distinct areas within the city and are not generally to be found in the suburbs. While the racially unrestricted choice of black persons and economic factors may

[17] The foregoing statistics are taken from the *HEW 1972 Survey*, at 33-38. The remaining three school districts were Hamtramck (71.7 percent white); River Rouge (56.7 percent white); and Westwood (54.7 percent white). *Id.*

have played some part in the development of this pattern of residential segregation, it is, in the main, the result of past and present practices and customs of racial discrimination, both public and private, which have and do restrict the housing opportunities of black people. On the record there can be no other finding." (23a.)

Elaborating on this finding, the court further found:

"Governmental actions and inaction at all levels, federal, state and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area. It is no answer to say that restricted practices grew gradually (as the black population in the area increased between 1920 and 1970), or that since 1948 racial restrictions on the ownership of real property have been removed. The policies pursued by both government and private persons and agencies have a continuing and present effect upon the complexion of the community—as we know, the choice of a residence is a relatively infrequent affair. For many years FHA and VA openly advised and advocated the maintenance of "harmonious" neighborhoods, i.e., racially and economically harmonious. The conditions created continue. While it would be unfair to charge the present defendants with what other governmental officers or agencies have done, it can be said that the actions or the failure to act by the responsible school authorities, both city and state, were linked to that of these other governmental units. When we speak of governmental action we should not view the different agencies as a collection of unrelated units. Perhaps the most that can be said is that all of them, including the school authorities, are, in part, responsible for the segregated condition which exists. And we note that just as there is an interaction between residential patterns and the re-

cial composition of the schools, so there is a corresponding effect on the residential pattern by the racial composition of the schools." (23a-24a.)

The record further shows that this residential segregation has been converted into school segregation by locating schools and assigning school children on the basis of neighborhood school plans (35a). In 1970, the student population of the Detroit School District was 63.8 percent black (21a).[18] Of the 181,538 black school children in this district, 73.7 percent attended schools at least 90 percent black; 79.3 percent attended schools at least 80 percent black. In the 53 suburban districts that the trial court would have included in the remedy, there were only 19,936 black school children in 1970. The vast majority of these black students (96 percent) were located in nine school districts.[19] In those districts, 44 percent of the black children attended schools at least 90 percent black; 70 percent attended schools at least 75 percent black.[20]

In addition, the record shows, and both of the lower courts found, that local school officials made substantial efforts to confine the outward reach of the core area. Such efforts within the Detroit School District included the use of optional zones in racially mixed neighborhoods,

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[18] These figures are taken from HEW Office for Civil Rights, *Directory of Public Elementary and Secondary Schools in Selected Districts, Enrollment and Staff by Racial/Ethnic Group* (1970), at 655-658, (hereinafter, *HEW 1970 Directory*). We have also used the *HEW 1972 Survey* which shows the Detroit School District to have been 67.6 percent black in 1972. Because the 1972 Survey does not include the racial identity of the students in the schools within the various districts, we, at this point, use the 1970 statistics which do include these figures.

[19] These districts were Highland Park, Inkster, Ecorse, Westwood, River Rouge, Hamtramck, Romulus, Oak Park, and Ferndale. *Id.* at 638-713.

[20] *Id.*

the changing of attendance lines and feeder school patterns, the use of bus transportation, transfer policies, the use of grade patterns, and school construction policies (24a-26a; 118a-151a; IIa 171-312). State officials were also implicated by approving school construction sites which had been selected on a discriminatory basis (26a-27a, 151a; IIIa 38-40).

The record, however, is not complete as to the interdistrict impact of these containment policies because these matters did not lie at the heart of the case originally presented to the trial court. For the same reason, the record does not fully explore the extent to which other official actions have contributed to the interdistrict school segregation. But it does show that the State of Michigan maintained at least one all black school district in the Detroit suburbs—Carver—in which no high school was operated. Instead, the black children were transported across school district lines, away from white schools in the suburbs, past a white school in the City of Detroit, and into a predominantly black school in the City (96a; Va 181).

Furthermore, as the district court found, the State's laws and regulations governing the availability of transportation, the issuance of school bonds, and the distribution of state aid to local school districts have resulted in inequalities between the Detroit School District and the suburban districts, thus making the suburban districts all the more attractive to middle and upper income whites. As that court stated:

> "The State refused until this session of the legislature, to provide authorization or funds for the transportation of pupils within Detroit regardless of their poverty or distance from the school to which they were assigned while providing in many neighboring, mostly white, suburban districts the full range of state supported transportation. This and

other financial limitations, such as those on bonding and the working of the state aid formula whereby suburban districts were able to make far larger per pupil expenditures despite less tax effort, have created and perpetuated systematic educational inequalities." (27a.)

With respect to official actions in the outlying districts, the findings of the district court (*supra*, pp. 21-23) indicate that the containment policy implemented at the edges of the core has been reinforced by both private and official housing discrimination in the suburbs. Those findings are supported by the record. With respect to private housing discrimination, Richard V. Marks, an expert on the patterns of racial occupancy in the Detroit area, testified:

> "So that as black folks sought housing in that market and as the numbers of black people in our city increased, each year the number of housing cases that we would have to deal with where there was evidence of rock-throwing or mob action or efforts to enforce covenants or conspiracies to prevent people from moving in, these kinds of things literally fill file cabinets in our office and at some points we have charted the nature of housing incidents in the private market that evidenced clearly the opposition of some white people to the movement of black families.
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> * * *
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> "When that pattern, when evidence of a pattern, not just of individual refusals, but a pattern that exists throughout a total area, we call that containment. It is just as effective a barrier as if a wall were built in the community." (IIa 14-15, 17.)

Speaking specifically about private discrimination in the white suburban districts, Donald J. Bauder, of the Michigan Civil Rights Commission, gave several examples of harrassment and intimidation that have been visited upon

black families who have moved to such predominantly white suburbs (IIa 69).

As to official responsibility for the residential segregation in the area, including the suburban districts, Allen F. Priestly, a vice-president of a title company, stated:

> "From 1910 through February 15, 1950, almost all new subdivisions throughout Metropolitan Detroit contained restrictions and covenants against ownership and occupancy by Negroes, except in some cases where Negro residence was restricted to domestic servants and the like. . . . A similar pattern existed in the suburbs to the considerable extent to which they have been subdivided by 1950." (IIa 20.)

Furthermore, Mr. Marks testified that public housing was segregated until 1952 (IIa 16-17); and even more recently, according to William L. Price, past president of the Detroit Housing Commission, public housing projects were placed exclusively in areas that were heavily black in population, rather than in white areas or white suburban districts (IIa 66, 68).

Moreover, actions of the school officials in these white suburban districts may have contributed to interdistrict school segregation. The racial identity of the suburban student bodies has been replicated in the suburban faculties.[21] In the 44 suburban districts where blacks constituted less than 5 percent of the student population, school authorities in 1972 employed 17,893 teachers, only 109 (or 0.6 percent) of whom were black. Indeed, 21 of these 44 suburban school districts maintained 100 percent white faculties. Detroit, on the other hand, em-

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[21] In *United States* v. *School District No. 151, Cook County*, 301 F. Supp. 201, 206 (N.D. Ill. 1969), *aff'd*, 432 F.2d 1147 (7th Cir. 1970), the court stated: "The lack of white teachers in black schools and black teachers in white schools cannot be inadvertent or attributable to their place of residence . . . ."

ployed 4,563 black teachers, or 46.5 percent of its faculty, in 1972.[22] Such racial identification of the suburban school systems contributes to interdistrict segregation by encouraging white and discouraging black in-migration.

B. This Case Should Be Remanded to the District Court for Further Proceedings on the Question Whether Official Actions Have Contributed Substantially to Interdistrict School Segregation in the Detroit Metropolitan Area.

In our view, this Court should remand this case to the district court for further proceedings on the scope and nature of the interdistrict violations and the appropriate remedy. This is only the second northern school segregation case to be heard by the Court on the merits since *Brown*.[23] It raises important and novel questions concerning the circumstances which warrant an interdistrict remedy in a northern setting. The constitutional violation proved in the district court was that there is abundant de jure school segregation in the City of Detroit. This proof was framed in light of the remedy then sought —intradistrict desegregation (59a-60a). Thus, the usual sharpening process of litigation was not brought to bear on the extent of interdistrict school segregation in the Detroit metropolitan area or the degree to which official actions, both inside and outside the Detroit School District, have contributed thereto. Since the nature of the violation determines the scope of the remedy, *Swann* v. *Charlotte-Mecklenburg Board of Educ.*, *supra*, at 16, then the nature and extent of official actions contributing to the interdistrict school segregation must be assayed in order to determine the scope of the remedy.

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[22] The statistics are taken from *HEW 1972 Survey*, at 33-38.

[23] The first, of course, was *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189 (1973). *Spencer* v. *Kugler*, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd per curiam*, 404 U.S. 1027 (1972), was decided on a motion to affirm following the filing of the jurisdictional statement.

Amicus urges, therefore, that the district court should be directed, on remand, to take evidence on (1) the number, nature, and impact of purely interdistrict violations in the metropolitan area, such as those involving arrangements for student assignments between or among districts; (2) the interdistrict impact of the policies and practices implemented by local officials confining blacks in the City of Detroit to black areas; (3) the existence and nature of similar containment policies and practices in other districts with substantial numbers of blacks, and their interdistrict impact; (4) whether official policies and acts, including those relating to housing and public employment, have contributed substantially to the uniracial character of the virtually all white suburban school districts; (5) whether the all white and virtually all white suburban faculties are the product in whole or in part of racial discrimination; (6) whether the suburban school boards have taken other action which encourages whites to remain in or move into their districts or discourages blacks from doing so; (7) the nature and impact of any action taken by state authorities in the metropolitan area which creates or preserves racially indentifiable school districts; and (8) any other official policies and practices which have contributed to interdistrict school segregation. The district court should be further directed to make findings of fact on the basis of this evidence and, in light of those facts plus the findings of the district court, not challenged here, on the existence of de jure segregation within the Detroit School District, to fashion appropriate relief.

In this connection, we suggest that any school district which is potentially subject to an interdistrict remedial order in this case should be afforded an opportunity to be heard on (1) any alleged discrimination attributed to school authorities or other public authorities having official responsibilities in that district; (2) any alleged

impact within the district of segregatory acts taken by state officials or local officials from other districts; and (3) the propriety of impinging upon the district in any plan to remedy school segregation in the metropolitan area.

CONCLUSION

For the foregoing reasons, the National Education Association suggests that the case be remanded to the district court for further proceedings.

Respectfully submitted,

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